Editor's note: Appealed -- aff'd, Civ. No. A-5-72 (D. Alaska March 12, 1973), aff'd, No. 73-1930 (9th Cir. Sept. 3, 1974)

JAY FREDERICK CORNELL

IBLA 70-54 Decided October 26, 1971

Alaska: Trade and Manufacturing Sites

A trade and manufacturing site purchase application is properly rejected where the applicant fails to show an adequate business operation on the site.

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IBLA 70-54 : Anchorage 060593

JAY FREDERICK CORNELL : Trade and manufacturing
: site purchase applica-
: tion rejected

: Affirmed

DECISION

Jay Frederick Cornell has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated April 9, 1969, affirming a decision by the Bureau's Alaska state office of December 30, 1968, rejecting his application to purchase a tract of approximately 50 acres as a trade and manufacturing site and canceling his claim. The rejection was predicated on a finding that Mr. Cornell had failed to conduct a business on the land.

The application was made pursuant to section 10 of the Act of May 14, 1898, as amended, 48 U.S.C. § 461 (1958), which provides that:

> Any citizen . . . in the possession of and occupying public land in . . . Alaska in good faith for the purposes of trade, manufacture or other productive industry may each purchase one claim . . . upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry . . .

Section 5 of the Act of April 29, 1950, 48 U.S.C. § 461a (1958), requires claimants to file a notice of occupancy within ninety days from the initiation of the claim in order to be given credit for the occupancy maintained in the claim prior to the filing of the notice or an application to purchase, whichever is earlier. It then provides:

> Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

Mr. Cornell filed his notice of settlement claim on December 26, 1963, in which he claimed occupancy since December 17, 1963, stated there were no improvements on the land, and stated that the claim was desired for the purpose of "lodge, cabins, service station, and campsites (self owned)." By letter of March 21, 1965, Mr. Cornell stated he wished to include an airstrip in his plans, as it was essential to the operation. Additionally, in another letter, he asked if an extension of time beyond the five years could be given if construction was in progress. The Anchorage land office acknowledged his claim by letter of July 15, 1965, noted the intention of airstrip use, advised that no extension of time could be granted, and informed Mr. Cornell that a site for a prospective business could not be acquired under the act.

On December 13, 1968, Mr. Cornell filed his application to purchase the site. For improvements he listed picnic tables, an outhouse, trails, cleared campsites and an airstrip, at an estimated total value of $3,500. He indicated a commercial operation called "McKinley View Campgrounds," of rental of campsite space and recreational area with availability of an airstrip for access. By attached letter Mr. Cornell stated, ". . . I have advertised, I have done no business to date. This is due to the highway program."

Upon receipt of the decision rejecting his application and canceling his claim, Mr. Cornell requested reconsideration, stating by letter dated January 20, 1969, "I am in business . . . I can show no receipts . . . I have done no business yet . . ." and he requested a field inspection be made.

Upon the denial of this request, Mr. Cornell appealed the land office decision, requesting a hearing.

The Bureau decision on appeal affirmed the land office's action on the grounds that the required improvements had not been made on the land, that Mr. Cornell had admitted he had done no business and therefore he did not meet the statutory requirements to purchase the land as a trade and manufacturing site. The request for a hearing was denied on the basis there were no facts alleged which, if proven, would entitle him to favorable consideration of his application.

In his appeal to the Secretary, appellant requested that there be a field inspection of his trade and manufacturing site, as none had been made by Bureau personnel in rejecting his application. The Director, Office of Hearings and Appeals, requested the Bureau to make such an inspection. Pursuant to this request, Bureau personnel inspected appellant's trade and manufacturing site and also

his adjoining homesite claim (A-060592) (the validity of which is not in question here). A copy of the Bureau's report and other documents were submitted to appellant to afford him an opportunity to respond. Appellant and his attorney have filed responses.

In considering appellant's appeal the record has been thoroughly reviewed. Basically, the two questions posed by the appeal are whether the record and the law supports the Bureau's determination that appellant has not shown that the requirements for a trade and manufacturing site patent have been satisfied, and whether there is a factual dispute which requires a hearing before such a final determination should be made.

As to the latter question, an application for a trade and manufacturing site may be accorded a hearing where the fundamental facts determinative of his right to purchase the land applied for are in dispute. Clayton E. Racca, 72 I.D. 239 (1965). However, if the applicant fails to allege facts which, if proven, would entitle him to favorable consideration of his application, or admits facts which demonstrate he has not complied with the law, there is no basis for a hearing. Hershel E. Crutchfield, A-30876 (September 30, 1968); Carl A. Bracale, Jr., A-31149 (April 20, 1970). There are no fundamental factual disputes raised by appellant here. At most, he objects to certain findings and actions by the Bureau field examiners, but these are minor matters which do not go to the primary question of his compliance. We conclude that no basis for a hearing is present in this case and his request therefor is denied.

Appellant contends that compliance with the trade and manufacturing site law has been made because he has in good faith attempted to conduct a business upon the site. Although appellant cleared an area of the site for an airstrip, there is no evidence or showing by him that the site was to have any commercial use for an airstrip except as incidental to and providing access for the campground and recreational facilities. The mere clearing of the land for the airstrip was not sufficient to meet the requirements of the act where there was no showing of use for commercial purposes. See James E. Allen, A-30085 (February 23, 1965).

In addition to the clearing of a portion of the site for the airstrip, the only other improvements on the site shown by appellant are additional clearing of a portion of the tract for campsites and trails, the placement of one outhouse, and eight

picnic tables. 1/ Although the site originally was approximately 50 acres, appellant asserts that after excluding an area which he can't "prove up on" (originally intended for the lodge) and a highway right-of-way traversing the site there will only be 18 or 19 acres left within the site. The sole water supply for the campground is a natural spring which also apparently supplies his homesite. There is no indication that any distribution pipes or other facilities have been run to the campsites.

For the first time in this appeal, appellant has alleged that actual business operations were conducted prior to December 26, 1968, but they were within his homesite. He states that his wife prepared meals for three men working for the State of Alaska Highway Department who lodged in a cabin a neighbor had built. 2/ His gross receipts amounted to $450, with profit of only about $150, which he considered so nominal at the time he didn't purchase a business license then or mention it in his application to purchase as he thought it would be inconsequential. Under the circumstances, this was inconsequential as showing any business operation on the trade and manufacturing site.

Appellant has explained that actual commercial operations were not conducted on the trade and manufacturing site because of the difficulties of access -- the failure of the completion of the Anchorage-Fairbanks Highway to his site, and the failure of the public to respond to his advertisements. Aside from the improvements mentioned above, however, the most he has offered to substantiate his claim of a business enterprise on the claim are

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1/ The field report indicated that a root cellar was within the site and also appellant's residence, but when the site is surveyed both would be placed within his homesite claim. Appellant stated that he intended his shop to have been located within the trade and manufacturing site, but that the exact location cannot be determined. The building was erected after 1968. Appellant contends that by locating the south boundary line of the claim from the section corner one would need to chain 924' more or less instead of 660' as the field examiners did, and this would put the shop as well as the root cellar well within the homesite claim. The buildings within appellant's homesite claim cannot be considered as improvements to support his claims under the trade and manufacturing site law.

2/ According to the field report the cabin has been removed by the neighbor.

a state business license for 1968 for a campground and four newspaper advertisements, all of which read as follows:

McKINLEY VIEW
CAMPGROUNDS

Fly into scenic McKinley View Located -- Mi. 135 ANCH.-FBKS. HWY. Camp out & Enjoy the Ever Changing View of Mt. McKinley.

Appellant asserts that he has discussed his plans for a "camper park, swimming pool, barbecue pits, playground, horseback riding, picnic grounds, general store and restaurant for tourists and an observatory to view Mt. McKinley," with Alaska State Parks and Recreation Department personnel, who have expressed a willingness to give advice and to help. He states that his plans for the site are consistent with a state park encompassing the area or with any enlargement of Mt. McKinley National Park, as he would provide needed tourist facilities.

From reviewing the entire record, including the field report and new information submitted in this appeal, we must agree with the Bureau that the claimant has not shown that the requirements of the trade and manufacturing site law have been sufficiently met to warrant issuance of a patent here. Even assuming, without deciding, that a campground site alone would be a sufficient business use to constitute a "productive industry" within the meaning of the trade and manufacturing act, we cannot find that appellant has "possessed and occupied" the site adequately for such purpose, that there are sufficient improvements, and that the site is needed in the prosecution of a business.

Appellant contends that the Bureau incorrectly construed the trade and manufacturing act by requiring proof of gross receipts from a business operation, and that it was not his fault that users did not come to his facilities.

The Bureau's application of the act considered also the regulatory interpretation requiring that an application to purchase must show:

> That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade,

> business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the act of May 14, 1898 (30 Stat. 413; 48 U.S.C. 461). (43 CFR 2562.3(d)(1) (1971)).

Appellant has stressed the difficulties and efforts which he and his wife encountered in doing the work on the site. We appreciate the difficulties involved in such an undeveloped area with severe climatic conditions, and do not discount their efforts. Nevertheless, we cannot consider the improvements made to the tract as anything more than minimal even for a campground. Aside from the clearing of the eight sites, with the movable picnic tables, and one outside privy, there is nothing in the way of facilities or improvements to attract paying customers. The Bureau investigators did not question the potential of the site for a campground business, but the conclusion that so far all that has been shown is for a prospective business is supported by information given by the claimant. The regulation clearly requires that the site actually be used and occupied for a business. Since such a showing has not been adequately made, we must sustain the decisions reached below. Cf. Gunnar Navjord, A-30637 (December 28, 1966); Herschel E. Crutchfield, supra; Carl A. Bracale, Jr., supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Joan B. Thompson, Member

We concur:

Newton Frishberg, Chairman

Francis Mayhue, Member.